

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 15,579

United States Court of Appeals
for the District of Columbia Circuit

GOLDEN COMMISSARY CORPORATION, FILED MAR 16 1962

And

WILLIAM G. CARTER,

Joseph W. Stewart

CLERK

Petitioners,

267

v.

CARL L. SHIPLEY,

Respondent.

RE: ORDER EXPUNGING FROM THE RECORD PETITIONERS'
BRIEF IN SUPPORT OF THE PETITION FOR ALLOWANCE
OF AN APPEAL FROM THE MUNICIPAL COURT OF APPEALS.

PETITION FOR REHEARING BY THE DECIDING PANEL
AND/OR BY THE COURT IN BANC.

To The Honorable Judges Of The United States Court of
Appeals For The District of Columbia Circuit:

Golden Commissary Corporation, a corporation, and William G. Carter, petitioners, present this, their petition for a rehearing by the Deciding Panel and/or by the Court In Banc, in the matter of petitioners' brief in which the Court, by its order dated and filed March 7, 1962 (based upon respondent's Motion For Leave To File Motion To Strike And Expunge From The Record Out Of Time, filed March 7, 1962), directed the Clerk to file respondent's said motion, and by its order dated and filed March 7, 1962 (based upon respondent's Motion To Strike And Expunge From The Record, filed March 7, 1962), directed the Clerk to expunge from the record petitioners' brief in support of their petition for allowance of an appeal from the Municipal

Court of Appeals, filed in this case March 24, 1960 (as directed by decision order of that date).

Petitioners pray the Court to set aside and vacate the order directing the Clerk to expunge their brief, and, with regard to each of the following arguments and propositions, respectfully maintain and submit:

1. The Court, in judging petitioners' brief has not applied, but overlooked, it's established legal tests that

"The general rule is that defamatory matter appearing in a pleading filed according to law in a court having jurisdiction, if relevant and pertinent to the issue in the case, is privileged, even if it reflects on the character of one who is not a party to the suit."

and that

"In determining the question of relevancy in such cases, it is the rule that the construction should be liberal, and that the privilege should embrace any statement that may possibly be pertinent. All doubt should be resolved in favor of the relevancy or pertinency of the matter complained of."

under which petitioners claim that they had absolute legal privilege to make the arguments, statements and submissions which respondent erroneously moved to expunge as "redundant, immaterial, impertinent and scandalous."

2. This Court's said orders dated and filed March 7, 1962, concluding with ordering expungement of petitioners' brief, invade and nullify petitioners' constitutional right of free speech, and right of fearless advocacy of their case and legal views by petitioners and their attorney at law. Said orders read:

"ORDER

"Upon consideration of respondent's motion for leave to file a motion to strike and expunge from the record, out of time, and it appearing that the motion to strike and expunge from the record, petitioners' memorandum in opposition and a supplement to petitioners' memorandum in opposition have been lodged with the Clerk, it is

"ORDERED by the court that the Clerk be, and he is hereby, directed to file respondent's motion to strike and expunge from the record, petitioners' memorandum in opposition and petitioners' supplemental memorandum in opposition."

"ORDER

"Upon consideration of respondent's motion to strike and expunge from the record certain pleadings filed by petitioners, of petitioners'

memorandum in opposition and the supplement to petitioners' memorandum in opposition, it is

"ORDERED by the court that the aforesaid motion be, and it is hereby, granted and that the Clerk be, and he is hereby, directed to expunge from the record petitioners' brief in support of the petition for allowance of an appeal from the Municipal Court of Appeals, filed in this case March 24, 1960."

3. There is no prescribed lexicon of approved and permissible terms for use in briefs for criticism of a party's conduct, and of the actions and rulings of courts, to enable petitioners to avoid the vague, inapplicable, indefinite and non-legal criticisms of respondent, and this Court's action to expunge by the March 7, 1962, order. There being no such prescribed lexicon, petitioners, therefore, had a constitutional and legal privilege and right to use their own terms, which they did by proper, civil and descriptive words pertinent and relevant to the circumstances and situations they were discussing, and the legal propositions they were advancing, well within their absolute legal privilege.

4. Respondent estopped himself from making, and waived such right as he may have had to make, his Motion For Leave To File Motion To Strike And Expunge From The Record Out Of Time, filed October 12, 1961, and his Motion To Strike And Expunge From The Record lodged therewith, when he failed and neglected to file objections to petitioners' Motion For Special Leave To File Fourteen Page Brief (In Support Of Petition For Allowance Of An Appeal From The Municipal Court Of Appeals), with the identical brief here involved attached, which petitioners filed hereon March 18, 1960. Respondent at the very least could then have made and saved the objections that he delayed until October 12, 1961, to make. There should be an end to objecting at some point, and that point is governed by Rule 26 (a) on rehearings. Copies of petitioners' Motion For Special Leave To File Fourteen Page Brief and of the questioned brief are attached, marked Exhibit A (Appendix, 1) and Exhibit B (A, 2), and made part hereof by this reference.

5. This Court foreclosed respondent's too-late objection and also its expungement order of March 7, 1962, directing expunging of petitioners' brief,

by its decision order dated March 24, 1960, directing filing of the questioned brief, which reads:

"ORDER

"Upon consideration of petitioners' motion for leave to file a brief of 14 pages in support of the petition for allowance of an appeal from the Municipal Court of Appeals, and it appearing that no objections have been filed and that petitioners' brief has been lodged with the Clerk, it is

"ORDERED that the Clerk is directed to file petitioners' brief."
(Italics supplied.)

6. Respondent's Brief In Support Of Opposition To Petition For Allowance Of Appeal, filed April 4, 1960, does not make or show any of the objections to petitioners' brief which respondent first made on October 12, 1961, by his Motion For Leave To File Motion To Strike And Expunge. See Exhibit G, A, 30. Therefore respondent estopped himself from making and waived any such objections. A copy of said brief is attached, marked Exhibit C (A, 22), and made part hereof by this reference.

7. This Court, if petitioners' brief were objectionable on valid, legal grounds, should sua sponte have expunged it when the Court passed and filed its decision order dated and filed April 19, 1960, reading:

"ORDER

"Upon consideration of the petition for allowance of an appeal from the judgment of the Municipal Court of Appeals entered herein February 10, 1960, of petitioners' brief, of respondent's brief and of petitioners' reply brief, it is

"ORDERED by the Court that the petition for allowance of an appeal is denied."

This order states specifically that it was "upon consideration . . . of petitioners' brief." Any legal impropriety in and of petitioners' brief, such as impertinent and irrelevant defamatory matter which would have been scandalous, legally, should and would have had the Court's notice and action sua sponte at that time. As the Deciding Panel did not, on April 19, 1960, deem petitioners' brief to be subject to expungement, such action against it now is too late and mistaken.

8. This Court's Rule 26 (a), governing Petitions for Rehearing, reading:

"(a) PETITION. A petition for rehearing may be filed with the Clerk, when accompanied by proof of service on the adverse party within fifteen days after judgment or decision, unless the time is shortened or enlarged by the Court or a Judge thereof. . . ."

which would apply in the absence of any rule specifically applicable, is intended to have, and has, the legal effect of putting an end to litigation over legal decisions, by placing a limit on the time an application may be made by a party to change a decision, and also on the time of an application ~~with~~ that this Court legally has jurisdiction to consider. Rules have the force and effect of law for both the Court and parties. Where the time to apply for rehearing has expired, jurisdiction and the power to rehear and change decisions are ended and gone. This Court revised its Rule 26 on October 29, 1953, long after the enactment of Section 452, Title 28, U. S. Code, reading:

Sec. 452. Courts always open; powers unrestricted by terms.

All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders.

The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding. June 25, 1948, c. 646, 62 Stat. 907.

This Section 452 does not limit the power of this Court to make Rules of Practice and Procedure, and, therefore, this Court had full authority and power to limit the time for rehearing and application therefor to fifteen days. If this statute is interpreted according to its literal terms there is no fifteen days limit on petitions for rehearing. However, this Court revised its Rule 26 after the enactment of Section 452 and therefore the fifteen day limitation is binding both on respondent and on this Court.

9. The legal rules heretofore laid down by this Court as applicable to and governing the legal privilege of arguments, charges and statements in court pleadings (which includes petitioners' brief), and which show the error of expunging it, are shown by the following citations and quotations from this Court's reports, which remain unchanged and unmodified:

Young v. Young, 57 App. D. C. 157, 18 F2d 807, contains the following

rules:

"(1) The general rule is that defamatory matter appearing in a pleading filed according to law in a court having jurisdiction, if relevant and pertinent to the issue in the case, is privileged, even if it reflects upon the character of one who is not a party to the suit. . . .

"The question whether defamatory matter contained in a pleading is or is not pertinent or relevant to the cause is a question of law for the court, and not of fact for the jury. 'The question of the relevancy or pertinency of matters contained in the pleadings, when in issue, is never left to the jury, but is a question of law for the court.' 17 R.C.L.p. 336; Harlow v. Carroll, 6 App. D. C. 128. It follows that a demurrer to a petition for libel does not have the effect of admitting the pleader's allegation that the defamatory matter in question was not relevant or material to the cause in which it was set out. . . .

"In determining the question of relevancy in such cases, it is the rule that the construction should be liberal, and that the privilege should embrace any statement which may possibly be pertinent. All doubt should be resolved in favor of the relevancy or pertinency of the matter complained of. . . . 'There is no danger that the right of fearless advocacy will be unduly restricted by this limitation upon the privilege; for the matter, to which the privilege does not extend, must be so palpably wanting in relation to the subject-matter of controversy as that no reasonable man can doubt its irrelevancy and impropriety, and it will always be a matter of law for the judge, and never a question of fact for the jury, to determine that irrelevancy and impropriety.' Morris, J., in Harlow v. Carroll, supra."

In Harlow v. Carroll, 6 App. D. C. 128, where an attorney in a pleading impertinently and irrelevantly alleged and stated in a pleading that complainant "was a procuress and engaged in other unlawful practice and was of no veracity or reputation," the Court held:

Page 135: "We do not ignore the dictate of public policy that demands the utmost freedom consistent with reason in the conduct by counsel, parties, and witnesses, of their respective parts in judicial proceedings. The freedom of speech which is guaranteed by our Federal Constitution is nowhere more needed than in courts of justice, where it has been the immemorial privilege of the advocate and the guarantee of his faithful and fearless performance of his duty. But freedom of speech does not mean licentiousness; and the officer of justice, which the advocate is assumed to be, should not be privileged, before God or man, to commit wanton injustice. . . .

" . . . 'This privilege must be restrained by some limit; and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject matter of the inquiry.'

" . . . 'Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes,

belongs to the same class, where they have confined themselves to what was relevant and pertinent to the question before the court.'

Page 137: " . . . 'There is another class of privileged communications where the privilege is absolute. They are defined in *Hastings v. Luck*, 22 Wend. 410. In this class are included slanderous statements made by parties, counsel or witnesses, in the course of judicial proceedings, and also libellous charges in pleadings, affidavits, or other papers used in the course of the prosecution or defense of an action. In questions falling within the absolute privilege the question of malice has no place. However malicious the intent, or however false the charge may have been, the law, from considerations of public policy, and to secure the unembarrassed and efficient administration of justice, denies to the defamed party any remedy through an action for libel or slander. This privilege, however, is not a license which protects every slanderous publication or statement made in the course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation, or at least it does not protect slanderous publications plainly irrelevant and impertinent, voluntarily made, and which the party making them could not reasonably have supposed to be relevant.

Page 139: " . . . , we may said that we are of opinion that the cause of justice can never be subserved by the perpetration of palpable injustice, and that there can be no just rule of public policy that would not clearly distinguish between reasonable freedom of speech and the wantonness of unjustifiable malice. There is no danger that the right of fearless advocacy will be unduly restricted by this limitation upon the privilege; for the matter, to which the privilege does not extend, must be so palpably wanting in relation to the subject-matter of controversy as that no reasonable man can doubt its irrelevancy and impropriety;

Page 140: " . . . Wanton libel and slander wholly irrelevant and uncalled for, are no more entitled to the privilege of immunity from suit than are assault and battery, or any other violation of right.

"In our discussion of this question, we have not deemed it necessary to take note of the well recognized distinction between slander and libel. The latter, of course, is the more heinous, because more deliberate and willful. The distinction would merely tend to restrict the privilege more in cases of libel than in those of slander.

"We are of opinion that the libellous matter complained of in this case was not privileged; and that both counsel and client concerned in utterance are liable in a suit at law to the person injured thereby."

In *Brown v. Shimabukuro et al.*, 73 App. D. C. 194, 118 F2d 17, Judge

Edgerton (then Associate Justice) held:

"In this jurisdiction, among others, statements in pleadings and affidavits are absolutely privileged if they have enough appearance of connection with the case in which they are filed so that a reasonable man might think them relevant. They need not be relevant in any strict sense. . . ."

10. Petitioners' case in this Court was briefed upon the pertinent and relevant propositions that (1) respondent had abused his office as a member to maliciously and wrongfully injure and damage petitioners, and had in his pleadings and procedures flouted and ignored the rules of the Municipal Court

for the District of Columbia, (2) the Municipal Court for the District of Columbia had erroneously failed to apply and ignored its own rules of court and rules of decisions of this Court and of the Municipal Court of Appeals in its actions and rulings, and (3) that the Municipal Court of Appeals had not accurately, correctly and fully stated the facts as to decisive and important facts and issues in the case, and had erroneously failed to apply and ignored the rules of decisions of this Court and its own Municipal Court of Appeals decisions.

11. Petitioners' questioned brief is a pleading of their arguments and views on the facts and law. It is termed "certain pleadings" in the Court's expungement order of March 7, 1962, supra.

12. Every argument, statement and submission in petitioners' questioned brief is pertinent and relevant because directed to petitioners' case and their views of the facts and law involved therein, and, therefore, were and are legally privileged, and are not subject to legal condemnation and expungement. No deviation from pertinency and relevancy has been or can be specified. The fact that petitioners' views did not prevail does not limit their right of fearless advocacy of their views, nor make their views subject to expungement.

13. Respondent further estopped himself from making, and waived his right to make, his Motion For Leave To File Motion To Strike And Expunge etc., filed October 12, 1961, when he failed and neglected to move within the 15 days allowed for rehearing by this Court's Rule 26 to expunge and strike petitioners' questioned brief after this Court's decision order of April 19, 1960, denying petitioners an appeal from the Municipal Court of Appeals, and after this Court's decision order of November 10, 1960, denying petitioners' motion for leave to file petition for rehearing out of time. Rule 26 was the general rule applicable in the circumstances, no rule being specifically applicable. Respondent, upon said April 19, 1960, order, which was a deci-

sion on the merits, was then completely free and unimpeded to make a motion to expunge petitioners' questioned brief, and his failure and neglect to do so within the 15 days allowed by Rule 26 estopped him and was a waiver of any right he may have had. Respondent in his Motion For Leave To File Motion To Strike and Expunge etc., Exhibit G (A, 30), filed October 12, 1961, states as a ground that:

"1. Respondent could not properly have filed said motion until there was a final decision on the merits, as the motion would have raised collateral issues interfering with a decision on the merits, and would probably have led to a protraction of legal procedures not conducive to the cause of justice."

but he shows no ground or reason why he could and did not file his motion within fifteen days after April 19, 1960, the date of the order denying petitioners an appeal, or excusing his laches and long delay.

14. This Court foreclosed respondent's too-late objections and also its expungement order of March 7, 1962, to fifteen days by its decision order of April 19, 1960, above quoted, denying petitioners an appeal, and by its decision order of November 10, 1960, denying petitioners' motion for leave to file a petition for rehearing out of time.

15. Respondent further estopped himself from making, and waived his right to make, his Motion For Leave To File Motion To Strike And Expunge, etc., filed October 12, 1961, by failing to make the objections he made therein in his Opposition To Motion For Leave To File Petition For Reconsideration, filed September 15, 1960. See copies of respondent's said Opposition etc. attached hereto, marked Exhibit F (A, 29), of petitioners' Motion For Leave To File Attached Petition For Reconsideration Of Denial Of An Appeal From Judgment Of The Municipal Court of Appeals, filed herein September 12, 1960, attached hereto, marked Exhibit D (A, 24), and of petitioners' proposed Petition for Reconsideration Of Denial Of An Appeal From Municipal Court of Appeals, lodged therewith, marked Exhibit E (A, 25), all made part hereof by this reference.

16. Respondent's Motion For Leave To File Motion To Strike and Expunge from The Record Out Of Time was mistakenly based on vague, indefinite and non-legal grounds, as herein shown. A copy of it is attached, marked Exhibit G (A, 30), and made part hereof by this reference.

17. Respondent's Motion To Strike And Expunge From The Record was lodged on October 12, 1961, with respondent's Motion For Leave to file it, and filed March 7, 1962. A copy is attached, marked Exhibit H (A, 30), and made part hereof by this reference. It is based on vague, indefinite and non-legal grounds. Its "ground" is that petitioners' arguments, statements and submissions therein specified "are redundant, immaterial, impertinent and scandalous." Respondent erroneously attempts to apply to petitioners' brief the pleading rules of Federal Civil Rule 12 (f) which are inapplicable thereto by the limitation of the Federal Civil Rules to pleadings specified by Federal Civil Rule 7 of "Pleadings Allowed." Briefs are not included. Legally the term "scandalous" covers only statements that are impertinent and irrelevant to the issues; it is legal and proper to allege and discuss scandalous conduct of a party that is the basis of the litigation. The limited pleadings "Allowed" by Federal Civil Rule 7 are required by Federal Civil Rule 8 to be "short and plain" statements of ultimate facts, to be admitted or proved. Briefs are arguments, statements and submissions expressing the views of the pleader on the facts and law. Necessarily, they cannot be, and are not required to be, "short and plain" statements of ultimate facts. They may advocate unpopular and unusual views. Respondent does not claim or specify a single misstatement of fact, or that any of petitioners' arguments, statements and submissions are not pertinent and relevant to the issues as argued and viewed by petitioners. Respondent therein admits that "it would have been more timely to move earlier to strike the above cited contemptuous and libelous statements" and makes the invalid excuse that "it would have introduced a collateral issue prior to a decision." The concluding

statements of the Motion To Strike and Expunge are all vague, indefinite and non-legal grounds that do not even mention the legal tests of pertinency and relevancy of petitioners' arguments, statements and submissions. Respondent's motion should have been overruled because it was improperly grounded as well as out of time.

18. Petitioners' Memorandum In Opposition To Respondent's Motion To Strike And Expunge From The Record (lodged with the Court October 9, 1961, filed March 7, 1962) and Supplement To Petitioners' Memorandum In Opposition To Respondent's Motion To Strike And Expunge From The Record (lodged with the Court October 13, 1961, filed March 7, 1962) show clearly (1) that each of petitioners' questioned arguments, statements and submissions were pertinent and relevant to petitioners' case, and made well within petitioners' right of fearless advocacy, and, therefore, under this Court's decisions, were constitutionally and legally privileged, absolutely, and were not improper nor subject, nor was petitioners' brief in which they appear legally and properly subject, to expungement, and (2) that respondent's Motion To Strike And Expunge came too late. Copies thereof are attached, marked Exhibit I (A, 33) and Exhibit K (A, 44), and made part hereof by this reference.

19. The Court's expungement decision orders of March 7, 1962, supra, deny and nullify, without legal support, petitioners' attorney's duty to the law and to petitioners set out in the Canons of Professional Ethics which have the force and effect of law.

See: Re George I. Rothman, 1953, 12 NJ 528, 97 A2d 621, 39 ALR2d 1032.
Consolidated Theatres v. Warner Bros. Cir. Mgmt. Corp., 216 F2d 920, 52 ALR2d 1231.

Canon 15 contains the following:

"The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exercise of his utmost learning and ability.' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty."

Canon 29 contains the following:

"Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client."

CONCLUSION.

Petitioners respectfully submit that the Court's March 7, 1962, orders to file respondent's motion to strike and expunge, and granting said motion and directing expungement from the record of petitioners' brief in support of their petition for allowance of an appeal from the Municipal Court of Appeals, filed in this case March 24, 1960, as directed by special decision order of that date, and resting here unquestioned until October 12, 1961, although respondent could and should have raised his objections within the time for rehearing, mistakenly (1) invade and nullify petitioners' constitutional right of free speech and right of fearless advocacy of their case and legal views in connection with the facts by them and their attorney at law, (2) deny and nullify petitioners' legal privilege to make the questioned arguments, statements and submissions, and (3) give effect to respondent's motions which do not claim or show any misstatement of fact by petitioners, or any impertinent or irrelevant argument, statement or submission by them, and which were filed long after respondent's complaints had been barred by laches and this Court's Rule 26.

Petitioners further respectfully pray and submit that said March 7, 1962, orders should be vacated and set aside.

Respectfully submitted,

H. Clay Espey,
219 Southern Building,
1425 H Street, N.W.,
Washington 5, D. C.,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL

I, the undersigned attorney for Petitioners Golden Commissary Corporation, a corporation, and William G. Carter, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

H. Clay Espey,

Attorney for Petitioners.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing petition for rehearing was served on Alex Akerman, Jr., Esq., Attorney for Respondent, by delivering it to his office in the National Press Building, 14th and F Street, N. W., Washington, D.C., this 16th day of March, 1962.

H. Clay Espey,

Attorney for Petitioners.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,579

EXHIBIT A.

GOLDEN COMMISSARY CORPORATION, A Corporation, and WILLIAM G. CARTER,

vs.

Petitioners,

CARL L. SHIPLEY,

Respondent.

Filed March 18, 1960.

MOTION FOR SPECIAL LEAVE TO FILE FOURTEEN PAGE BRIEF
(In Support of Petition for Allowance of an Appeal)

Come now petitioners, by their undersigned attorney, and move the Court for special leave to file their attached fourteen page brief, and for grounds state:

1. Petitioners' attorney was unable to compress their brief into ten typewritten pages, in attempting to do justice to their cases covered by a record of 1767 pages, 81 in Municipal Court of Appeals No. 2019 and 1686 in No. 2468.
2. Petitioners' attorney has had to brief facts and legal points inadequately in order to keep their brief to fourteen pages.
3. Petitioners' attorney has had to eliminate mention of numerous errors that were briefed below, but which the Municipal Court of Appeals ignored and did not mention, such as the Trial Judge's sustaining of defendant's objections to plaintiffs' questions to show that Mrs. Kittelle was not a person in need of charitable help (R., 168-170), although plaintiffs had so alleged (R. 2019, 48) and defendant had denied the allegation (R. 1531), assistance to a poor person not being champerty or maintenance. Johnson v. Van Wyck, 4 App. D. C. 294, 318; Champerty and Maintenance, Sec. 24, 14 CJS 368.
4. Justice to petitioners justifies exercise of this Court's discretion to permit the filing of petitioners' attached brief.

H. Clay Espey,
Attorney for Petitioners.

EXHIBIT B

(Caption)

BRIEF IN SUPPORT OF PETITION FOR ALLOWANCE OF AN APPEAL

H. Clay Espey,
Attorney for Petitioners,
1425 H Street, N. W.,
Washington 5, D. C.

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1) (Caption)	

BRIEF IN SUPPORT OF PETITION FOR ALLOWANCE OF AN APPEAL

Petitioners are designated plaintiffs and respondent is designated defendant, according to their alignment below. This brief necessarily is far too short to do justice to the record and plaintiffs' case. The record is so voluminous that plaintiffs respectfully suggest that the Court call for the briefs below in order that this case may be better understood in determining whether an appeal should be allowed.

STATEMENT OF QUESTIONS INVOLVED.

1. Is a judgment entered upon a directed verdict for defendant upon plaintiffs' full proof of their Amended Complaint allegations to stand affirmed, where the plaintiffs' Amended Complaint had been held to state a cause of

action and where there were issues of fact for the jury, the Trial Court apparently taking the erroneous view that the evidence should be considered in the light most favorable to defendant attorney at law.

(a) The question was answered "Yes" by the Municipal Court of Appeals.

(b) Plaintiffs contend it should be answered "No."

2. Is it the correct rule of law that defendant, a defeated, prominent attorney at law and political personality, against whose financially responsible client a final judgment for his successful opponent in a matter of small value is officially executed, can, without liability and responsibility in damages and upon his own personal knowledge of the facts, wreck his personal malice and vengeance upon his judgment opponent and upon its officer and agent who originally was not a party nor personally involved, and put them to great expense, injury and loss of time and money by an utterly groundless counter action for outrageously high damages, where over his personal opposition a Municipal Court landlord and tenant judgment was entered against his client adjudging Plaintiff Golden entitled to possession of land worth about \$30.00, where ^{he} allowed the judgment to become final without appeal, and where he was present when the United States Marshal's deputy officially executed the judgment by tearing down a fence on Plaintiff 2) Golden's land and delivering possession to it, and where defendant, with legal and personal malice, two days later instituted a groundless action in the name of his then absent client against Plaintiffs Golden and Carter, the latter being the former's Treasurer and General Manager, in the District Court upon a claim of \$3,001.00 for allegedly causing the Marshal to trespass and tear down the fence, where he paid the initial costs from his own funds, where he unsuccessfully prosecuted the action to a judgment against his client, upon a jury verdict directed upon his opening statement, without payment or claim of payment from his client for such costs and for his services, and where he caused Plaintiff Golden expense of over \$1,000 for de-

fense, caused Plaintiff Carter who never before had been sued personally great mental anguish and distress over being sued and having to defend himself, and caused both plaintiffs great loss of valuable time; is it the correct rule of law that a defeated, angry attorney can be in position, without liability and responsibility in damages, to cause his successful opponents not to execute such judgment by blackmailing them from causing execution by threatening a counter action in damages, or after threat and execution punishing and wreaking vengeance upon them by putting them to greater expense in defense than the judgment was worth by instituting and prosecuting a counter action for damages, when such attorney knew or should know that such an action is utterly groundless.

(a) The question was answered "Yes" by the Municipal Court of Appeals.

(b) Plaintiffs contend that it should be answered "No."

3. Has this Court of Appeals by its decision brought the law of the District of Columbia into line with the rule of decision of most jurisdictions that the institution and prosecution of a single, maliciously brought and prosecuted, groundless civil action gives rise to a cause of action for malicious prosecution and malicious use of process, and changed its former rule of decision that there had to be either attachment of property or two successive prior groundless actions before the action would lie.

(a) The question was answered "No" by the Municipal Court of Appeals.

(b) Plaintiffs contend that it should be answered "Yes."

4. Can the Municipal Court of Appeals (and also the Municipal Court) ignore and fail and refuse to follow this Court of Appeals' rule of decision that a motion to dismiss should be overruled if any cause of action is stated in or can be proved in support of a complaint, as was done here by (1) overruling defendant's motion to dismiss plaintiffs' amended complaint as to their allegations of unlawful maintenance, and (2) erroneously going further and granting it as to plaintiffs' ³allegations of malicious prosecution and

malicious use of process.

(a) The question was answered "Yes" by the Municipal Court of Appeals.

(b) Plaintiffs contend it should be answered "No."

5. Can the Municipal Court of Appeals (and the Municipal Court) ignore and fail and refuse to enforce Municipal Court Civil Rule 8 (b), requiring a defendant to admit or deny and fairly meet the substance of the allegations of a complaint, by affirming a judgment for defendant based upon three rulings denying plaintiffs' three motions to strike defendant's short answer denying all allegations in plaintiffs' amended complaint, including the facts that defendant is a lawyer and participated in the landlord and tenant action and the District Court trespass action.

(a) The question was answered "Yes" by the Municipal Court of Appeals.

(b) Plaintiffs contend it should be answered "No."

STATEMENT OF THE CASE.

The Municipal Court of Appeals erroneously affirmed a judgment of the Municipal Court for defendant entered upon a verdict erroneously directed for defendant after a full trial with evidence adduced for plaintiffs supporting all their allegations and for defendant which raised issues of credibility and fact for the jury. Said decision also erroneously affirmed erroneous interlocutory judgments of the Municipal Court as follows: (1) After correctly overruling defendant's motion to dismiss plaintiffs' single count amended complaint as to unlawful maintenance, erroneously granting said motion to dismiss plaintiffs' allegations as to malicious prosecution and malicious use of process; (2) erroneously overruling plaintiffs' three motions to strike defendant's short answer denying all allegations of plaintiffs' amended complaint and to enter a default judgment for plaintiffs, although the record before the Municipal Court on each occasion clearly showed defendant had denied incontrovertible record facts which he knew personally and should have admitted.

Plaintiffs contend, as it appears to them, that the lower courts have misapplied and misstated the law and glossed over or ignored the facts in order to favor and protect defendant.

In January, 1954, Golden acquired by deed a parcel of land in the interior of Square 1197, surrounded on the west by houses on the east side of Thomas Jefferson Street, on the north by buildings on the south side of M Street, on the east by houses on the west side of 30th Street, and on the south by the Chesapeake and Ohio Canal (R., 1634). The "disputed strip" was a part thereof. A survey⁴ showed that the rear fences of some adjoining lots were on Golden's land. Golden reached an amicable agreement with all except Mrs. Kittelle. Some owners of adjoining lots employed defendant as their attorney in seeking rezoning of Golden's land. They paid defendant \$500 as his compensation or fee. (R, 744,961,962,966) Mrs. Little contributed \$20 to the fund, the only payment she made to defendant (R, 20, 104, 120,124,274,275,501,562, 744, 755, 758,904,1055,1089). Golden tendered Mrs. Kittelle forms of agreement to settle the "disputed strip" ownership and a check for \$30, but she did not then sign the agreement and check and retained them (R, 98,483,763,768,1642-3-4-5).

On June 17, 1954, Golden instituted Municipal Court L&T 31299-54 against Kittelle for possession of the disputed strip (R,116,1577,1591). On June 18, 1954, defendant entered into a letter agreement with Kittelle, which stated in part, after referring to the zoning matter, "As your attorney in the matter referred to I will do all things necessary to protect your interests in case number L & T 31299-54 in the Municipal Court for the District of Columbia." (R, 116-119,203,783,1627) Defendant prepared Kittelle's answer, pleading title to the disputed strip, which she executed June 25, 1954 (R, 121,122,300,771,1581). She did not execute the undertaking mandatorily required by Sec. 11-730,D.C.Code,1951 (R,123,523,525,529,794,913,1057). Kittelle left for Europe on June 25th (R,122). On July 2d defendant filed

Kittelle's answer (R,1565). Plaintiff Golden served defendant on July 2 and filed on the 3d its Motion to Strike Answer Alleging Title and for Judgment on Verified Complaint (R,466,914,1582,1583). On July 7, 1954, over defendant's opposition (R,469,798), Judge Scott granted said motion and judgment (R,530,798,799,891,892,916,1584,1585). Neither Kittelle nor defendant appealed (R,927,1584). This was defendant's first defeat by Golden.

Defendant's application to "up-grade" zoning of Golden's land was denied before July 22, 1954 (R,358,1652). This was his second defeat by Golden.

On July 26th, Golden's attorney wrote defendant requesting settlement in L&T 31299 (R,923,924,1638), and requested Municipal Court Clerk to issue Writ of Restitution (R,586,1584,1586). It issued July 26th (R,531 et seq., 1587).

On August 4, 1954, the United States Marshal's deputy executed the writ (R,74 et seq., 925,1588). Defendant was present and requested stacking of fence material on Kittelle's yard, and this was done upon defendant's release (R,79,80,81,479,534,807,1589,1601). Defendant threatened suit (R,82), although as a lawyer he must have known Kittelle had no cause of action.

5) On August 6, 1954, without consulting then absent Kittelle, defendant upon his personal knowledge instituted District Court Civil Action 3348-54, Kittelle, Plaintiff, vs. Golden and Carter, Defendants (plaintiffs here) for \$3,001.00 for trespass (R,79,161,214,221,302,304,309,310,314,319,320, 820,821,1568). The complaint (R,1568) was an illegal, collateral attack on the L&T judgment, a groundless action, filed with legal and personal malice and without probable cause, particularly as to Plaintiff Carter, who was not a party to L&T 31299. Kittelle did not engage defendant to file CA 3348 (R,137,1034). Defendant paid the initial costs, \$10 to the Clerk and \$2 to the Marshal, from his fee in the zoning case (R,53,439,551,652,654, 843,844,904,962). Kittelle never paid defendant any of said costs, nor for his services, and defendant never claimed from her payment for such costs

and services (R,124,125,904). Defendant had no interest in the land (R,563,810,811). Kittelle owned 1031 T. Jefferson Street, N. W., adjoining the disputed strip on it's west. In April, 1956, defendant admitted to Carter he filed CA 3348 because he was made (R,481,484).

CA 3348 went to trial before Judge Curran and a jury on May 29, 1956 (R,148,149,835,1566). Defendant's opening statement showed he was making an illegal, prohibited, collateral attack on L&T judgment and writ execution thereunder by stating he would prove the judgment and writ void (R,1061,1062). Plaintiffs (as defendants) moved for directed verdict on defendant's opening statement, which was granted (R,150,151,314,557,558,843,1586,1567), and judgment was entered for defendants there (plaintiffs here) (R,558,559,1567). No appeal was taken and judgment became final (R,1641). Defense of CA 3348 cost Golden more than \$1100 (R,1639). Kittelle paid Golden's CA 3348 costs taxed against her (R,307,308,365,366,367,843,1629,1630). Plaintiffs learned from Kittelle that defendant instituted and prosecuted CA 3348 and paid it's initial costs without ever calling upon her for payment for such costs or his services (R,124,125,569). On January 24, 1957, plaintiffs instituted this action as No. 3009-57 in Municipal Court (R,2019,1). On April 3, 1957, plaintiffs' Amended Complaint was filed by leave of Court (R,2019,40-48,76,82,83). Defendant's Motion to Dismiss, filed February 16, 1957, was heard April 3d, directed to the Amended Complaint (R,2019,9,42 et seq.). Considering the situation's complexity, plaintiffs' Amended Complaint is a "short and plain statement," and alleges the torts of malicious prosecution, malicious use of process and unlawful maintenance. On April 30, 1957, Judge Fickling entered a judgment order erroneously granting defendant's motion to dismiss the single-count amended complaint for damages for malicious / use of process and malicious prosecution, and at the same time correctly overruled defendant's motion to dismiss amended complaint for damages for unlawful maintenance (R,2019,76). It was not a final order (Golden etc. v. Ship-

ley, 134 A2d 324). On August 17, 1957, defendant filed his Answer (R.,1531) stating: "Comes now defendant and denies all allegations contained in the complaint here, . . ." Defendant personally authorized his rule-violating answer (R,1037-39). On August 22, 1957, plaintiffs filed their first motion to strike answer and for default judgment (R,1532). On August 23d defendant's answer admitted his Answer is a "general denial" (R,1533). Defendant's deposition, taken before Chief Judge Walsh, admitted many of plaintiffs' amended complaint allegations he had denied (R,2019,42;R,1240 et seq.) On April 2, 1958, Chief Judge Walsh overruled plaintiffs' Motion to Strike and for Default Judgment (R,1536). During the jury trial, Judge Malloy (R,430) refused, in violation of Civil Rule 26 (d) (2), to permit plaintiffs to offer in evidence portions of defendant's deposition showing he admitted paying money to Marshal and Clerk (R,1296,1297). Defendant personally spoke up and admitted he made the payments (R,439). Plaintiffs orally renewed their motion to strike and for default judgment (R,440,1531). The Court erroneously overruled the renewed motion (R,449). On June 27, 1958, the fifth day of trial, after plaintiffs had proved all their Amended Complaint allegations, they orally renewed their motion to strike defendant's Answer denying "all allegations", and also moved the Court to have the case go to the jury on the sole question of damages and to have the jury fix plaintiffs' damages (R,691-705). The Trial Judge (aware of the rules by the argument and his statements (R,709,714,715,716) reserved his ruling. On June 30, 1958, sixth trial day, the Trial Judge erroneously overruled plaintiffs' renewed motion (R,1126), and said erroneously "motions like that come too late in this case." (R,1126,1130). The Trial Judge, on June 27th, fifth day of trial, stated he had not read the complaint (R,712,714,721), a clearly fatal error showing plaintiffs had not had a fair trial and calling for reversal. Plaintiffs proved their allegations in their Amended Complaint for, when plaintiffs rested their case, on June 27th, fifth day of trial, and defendant made a

verbal motion for a directed verdict, the Trial Judge would not entertain it (R,726,727). This indicated to plaintiffs that they, prima facie, had proved their case. Defendant testified in his own behalf (R,728 et seq.). Defendant, after plaintiffs and defendant rested, made a motion for directed verdict (R,1150). The Trial Judge erroneously held: (1) that the sole question was whether or not defendant, when he filed CA 3348, had⁷ had authority to file it (R,1202,1209,1224); (2) that ratification by Kittelle of defendant's institution of CA 3348 constituted a defense to defendant, regardless of his payment from his own funds of the costs and rendered her free his services (R,9,151,1151,1208,1209); (3) that ratification by Kittelle immunized and protected defendant from liability (R,1210,1211), contrary to the rule that "a principal may never lawfully authorize the commission of a tort by his agent."; (4) that although defendant did in CA 3348 file a groundless action, he would not charge the jury that he did (R,1212,1222); (5) that "to permit the jury to consider this allegation of unlawful maintenance would be left entirely or certainly primarily to conjecture and speculation as to whether or not the defendant here is guilty as alleged." (R,1224), when the evidence plainly would have supported and sustained a verdict for plaintiffs; (6) that he would direct a verdict for defendant on his motion, contrary to the rule of law that when decision of issues depends upon credibility of witnesses the case must go to the jury, and contrary to the rule that, in determining a motion for directed verdict, "the court must accept as true all evidence which tends to support plaintiff's case and must adopt every (favorable) inference which might reasonably be deduced therefrom." The Trial Judge erroneously directed a verdict for defendant (R,1251) and judgment for defendant (R,1544).

The opinion of the Municipal Court of Appeals, we regretfully state, appears to us to be a "whitewash" of defendant's clearly proven misconduct,

an evasion of the legal issues involved, a denial of the rights of the plaintiffs, and to indicate urgent call for an exercise of this Court's power of supervision.

SUMMARY OF ARGUMENT.

1. The Municipal Court having held that plaintiffs had alleged a good cause of action for unlawful maintenance and plaintiffs having adduced evidence and testimony clearly showing defendant's unlawful maintenance, it was reversible error for the Municipal Court to enter a judgment for defendant upon a directed verdict for him and for the Municipal Court of Appeals to affirm said judgment.

2. A civil action for damages lies against a lawyer and attorney at law who, upon personal knowledge, brings an utterly groundless action for damages against a party (and its officers and agents), which has obtained a final judgment against the lawyer's financially responsible client, upon the Marshal's execution thereof, pays the initial costs thereof and unsuccessfully prosecutes the same to judgment against his client, without payment or claims of payment for said costs and his services from his client. Such lawyer's tortious actions constitute malicious ⁸ prosecution, malicious use or process and unlawful maintenance.

3. It was reversible error, after overruling defendant's motion to dismiss plaintiffs' Amended Complaint as to unlawful maintenance, to proceed to grant the same motion as to the same single-count complaint as to malicious prosecution and malicious use or abuse of process.

4. It was reversible error to fail, neglect and refuse to enforce the rules of pleading against defendant's answer, and to strike it and to enter a default judgment for plaintiffs.

5. The judgment below should be reversed, with directions to order a new trial or entry of default judgment for plaintiffs and a jury to ascertain plaintiffs' damages. The opinion of the Municipal Court of Appeals was an

unjust glossing over of defendant's tortious misconduct, an evasion and misstatement of the legal issues involved, and a denial of equal justice to plaintiffs' rights.

ARGUMENT

- I. THE MUNICIPAL COURT OF APPEALS COMMITTED REVERSIBLE ERROR IN AFFIRMING A JUDGMENT OF THE MUNICIPAL COURT FOR DEFENDANT, ENTERED UPON A DIRECTED VERDICT FOR DEFENDANT, WHEN THE MUNICIPAL COURT HAD HELD THAT PLAINTIFFS HAD STATED A GOOD CAUSE OF ACTION FOR UNLAWFUL MAINTENANCE AND PLAINTIFFS' PROOF CLEARLY SHOWED THAT DEFENDANT HAD PAID THE \$12 INITIAL COSTS FROM HIS FEE IN ANOTHER MATTER WHEN HE INSTITUTED CA 3348 AND PROSECUTED THE SAME FOR A FINANCIALLY RESPONSIBLE CLIENT WITHOUT COMPENSATION OR CLAIM FOR COMPENSATION AND REIMBURSEMENT FOR SAID COSTS.

Unlawful maintenance is an offense against the common law and an actionable tort. The common law was in force during 1954-1956 and is still in force in the District of Columbia, and no Act of Congress has changed the common law offense and tort of unlawful maintenance. Sec. 49-301, D. C. Code, 1951; U. S. v. Davis, 83 U. S. App. D. C. 99, 167 F2d 228; Matthews v. Havner, 2 App. D. C. 349, p. 360 (quoting from Schaferman v. O'Brien, 28 Md. 565); Johnson v. Van Wyck, 4 App. D. C. 294, p. 315; Peck v. Heinrich, 6 App. D. C. 273, 284; 165 U. S. 624, 630, 17 Sup. Ct. 927, 929, 42 L.ed. 301; Sampliner v. Motion Picture Patents Co., 255 Fed.Rep. 242, 247; Marland v. Natl. Met. Bank, 84 F2d 238, 65 App. D. C.387; Atchison, Topeka and Santa Fe RR Co. v. Andrews, 338 Ill. App. 552, 88 NE2d 364, 14 AIR2d 728, 737; Gruber v. Baker, 23 P 585; Champerty and Maintenance, 14 CJS 357, 368, 387; Fletcher v. Ellis, 9 F.Cas.No.4863a; Goodyear Dental Vulcanite Co. v. White, 10 F.Cas.No. 5,602; 10 Am.Jur. Champerty and Maintenance, Sec. 33, p. 575, Sec. 36, p. 577.

The Municipal Court of Appeals was misleading when it said "the question raised is whether Mr. Shipley was acting as Mrs. Kittelle's attorney when he filed the trespass case.", held that maintenance "has always been held not to ⁹ extend . . . to persons acting in the lawful exercise of their profession, as counsel or attorneys-at-law.", and stated that "Mrs. Kittelle . . .

established by her own testimony that Shipley acted as her attorney in the trespass case." The crux was and is whether defendant acted in the lawful exercise of his profession. A license to practice law is not a license to commit malicious, personal torts. Hoppe v. Klapperich, 224 Minn. 224, 28 NW2d 780, 173 ALR 819; Hall v. Field Enterprises, Mun.Ct.App.D.C., 94 A2d 479; Attorneys at Law, 5 Am. Jur. 348. No financially responsible client who is willing to have an attorney pay the initial costs of her litigation and conduct it without pay for his services, can legalize such attorney's misconduct by authorizing or ratifying it, inasmuch as "an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal." Larson v. Domestic etc. Corp., 337 U. S. 682, 694, 93 L. ed. 1628, 1638.

Plaintiffs having alleged and proved unlawful maintenance by defendant, it was reversible error to affirm a judgment entered by a judge who usurped the jury's function upon the factual issues and directed a verdict for defendant upon his personal view of conflicting evidence. Gunning v. Cooley, 281 U. S. 90, 94, 74 L.ed. 720, 724; Capital Transit Co. v. Ringman, 94 U. S. App. D. C. 75, 76, 212 F2d 241; Peigh v. B&O R. Co., 92 U. S. App. D.C. 198, 199, 204 F2d 391; Furr v. Herzmark, 92 U. S. App. D. C. 350, 353, 206 F2d 468; Staples v. Johnson, 25 App. D. C. 155, 159; Auto Ins. Co. v. Williams, Mun.Ct.App.D.C., 111 A2d 876.

The Court below has decided a question of substance not heretofore determined by this Court, in a way probably not in accord with applicable decisions of this Court, calling for an exercise of this Court's power of supervision.

- II. DEFENDANT COMMITTED ACTIONABLE TORTS AGAINST PLAINTIFFS WHEN, UPON PERSONAL KNOWLEDGE, HE BROUGHT AN UTTERLY GROUNDLESS ACTION FOR DAMAGES UPON OFFICIAL EXECUTION OF A JUDGMENT AGAINST HIS CLIENT AGAINST THE JUDGMENT OWNER AND ITS OFFICER, AND PAID THE INITIAL COSTS FROM HIS OWN FUNDS AND UNSUCCESSFULLY PROSECUTED THE ACTION AND NEVER CLAIMED COMPENSATION FOR HIS SERVICES AND REPAYMENT OF THE COSTS, HIS CLIENT NOT BEING THE OBJECT OF CHARITY, IN PURSUANCE

OF HIS LEGAL AND PERSONAL MALICE. THE TORTS ARE MALICIOUS PROSECUTION, MALICIOUS USE OF PROCESS AND UNLAWFUL MAINTENANCE.

Contrary to the opinion of the Municipal Court of Appeals, it is now the law of the District of Columbia that unsuccessful prosecution of a single, groundless civil action with legal and personal malice gives rise to a cause of action for malicious prosecution and malicious use or abuse of process. *Holt v. Boyle Bros*, 95 U. S. App. D. C. 1, 217 F2d 16. The great Judge Parker held that justice "required that the law afford a remedy for the wrong sustained by one who has been injured in his person, reputation, property, or business by the institution of groundless proceedings in the courts." Plaintiffs have been ¹⁰ / so injured. See *National Surety Co. v. Page*, 58 F2d 145, 148. *Melvin v. Pence*, 76 U. S. App. D. C. 154, 130 F2d 423, holds that "When malice motivates a groundless claim and results in special injury beyond what assertion of rights ordinarily entails, remedy is afforded." Among plaintiffs' special injuries are damage to reputation by defendant's defamatory and untrue statements in his complaint in CA 3348 (R, 1568) alleged in plaintiffs' Amended Complaint (R, 2019, 42 et seq.). In *Holt v. Boyle Bros. supra*, this Court modified the rule of *Peckham v. Union Finance*, 60 App. D. C. 104, 48 F2d 106, requiring attachment of person or property, and the rule of *Soffos v. Eaton*, 80 U. S. App. D. C. 306, 152 F2d 682, requiring two unsuccessful groundless actions. See *Davis v. Boyle Bros.*, Mun.Ct.App. D.C., 73 A2d 517. Plaintiffs submit that their allegations and proof bring their case within the requirements of this case, contrary to the view below.

The use of process in a groundless action, called malicious abuse of process, is a tort and gives rise to an action for malicious abuse of process. See 14 ALR2d 322, cited in *Hall v. Field Enterprises*, Mun.Ct.App.D.C., 94 A2d 479, which case holds that "the right to charge an abuse of process arises when there has been a perversion of court processes to accomplish some end which the process was not intended by law to accomplish, . . ." As L&T 31299 judgment was final on July 18, 1954, and beyond appeal, defendant's use of

process in CA 3348 to retry Golden's right of possession by collateral attack on the I&T judgment was a tortious abuse of such process. The Municipal Court of Appeals was in error in holding "There was no abuse of process." Defendant had the correct method of attacking the I&T 31299 judgment, which was by way of appeal, but he let it go.

CA 3348 was groundless for no legal action arises upon proper official legal action. *Spruill v. O'Toole*, 64 App. D. C. 85, 74 F2d 599; *Wilson v. Bittinger*, 104 U. S. App. D. C. 403, 262 F2d 714; *Bank of U. S. v. Bank of Wash.*, 8 Peters 8, 8 L. ed. 299; *Simpkins v. Brooks*, Mun.Ct.App.D.C., 49 A2d 549; *Whitney v. Welnitz*, ___ Minn. ___, 190 N.W. 57, 28 ALR 88.

CA 3348 was groundless for it was an inadmissible, collateral, illegal attack on I&T 31299 judgment, and an illegal attempt to retry that case (R, 1061, 1062). *DeBobula v. Goss*, 90 U. S. App. D. C. 28, 193 F2d 35; *Simpkins v. Brooks*, Mun.Ct.App.D.C., 49 A2d 549; *Wade v. Union Storage & Transfer Co.*, Mun.Ct.App.D.C., 58 A2d 493; *Thomas v. Marvin's Credit, Inc.*, Mun.Ct.App.D.C., 81 A2d 340; *MacVey v. MacVey*, Mun.Ct.App.D.C., 98 A2d 794.

11) The instant case shows the need to allow this appeal and to further review the law of the District of Columbia regarding actions for malicious prosecution of and malicious abuse of process in groundless actions, for the Municipal Court of Appeals erroneously held that CA 3348 "did not constitute malicious prosecution and the trial court correctly dismissed this claim."

The Court below has decided questions of substance not heretofore determined by this Court, in a way probably not in accord with applicable decisions of this Court and contrary to general law.

III. THE MUNICIPAL COURT OF APPEALS ERRONEOUSLY IGNORED THE MUNICIPAL COURT'S ERRONEOUS RULING BOTH GRANTING AND DENYING DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' SINGLE-COUNT AMENDED COMPLAINT, CONTRARY TO THE RULE OF DECISION LAID DOWN BY THIS COURT.

Municipal Court Judge Fickling granted defendant's Motion to Dismiss plaintiffs' single-count Amended Complaint as to malicious prosecution and malicious use of process, but denied it as to defendant's unlawful mainten-

ance (R, 2019,76). On appeal the Municipal Court of Appeals held the order was not final. Golden Commissary Corporation v. Shipley, 134 A2d 324.

The lower courts ignored and violated the correct rule of decision that "A motion to dismiss should not be sustained 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff." Callaway v. Hamilton Natl. Bank, 90 U. S. App. D. C. 228, 231, 195 F2d 556; Hall v. Field Enterprises, Mun.Ct.App.D.C., 94 A2d 479; Cox v. Episcopal etc. Hosp., Mun.Ct.App.D.C., 134 A2d 328. On the appeal from the judgment on the directed verdict, the Municipal Court of Appeals did not even mention this rule, although it was completely briefed, but went on to hold that defendant's conduct did not constitute malicious prosecution or abuse of process.

This violation of the correct rule, at the threshold of the case, caused great confusion and handicapped plaintiffs throughout the case, and calls for remedial correction by this Court.

The Courts below have so far departed from the accepted and usual course of judicial proceedings, and the Municipal Court of Appeals has so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

IV THE MUNICIPAL COURT OF APPEALS IGNORED THE MUNICIPAL COURT'S ERRONEOUS DENIAL OF PLAINTIFFS' THREE MOTIONS TO STRIKE DEFENDANT'S ANSWER, AND FOR DEFAULT JUDGMENT, BASED UPON CLEAR VIOLATION OF THE RULE OF PLEADING.

Defendant prominent attorney at law and political personality was permitted to flout and violate with impunity Municipal Court Civil Rule 8 (b), requiring /¹² him in answering to admit or deny, and fairly meet the substance of plaintiffs' allegations, and the lower courts refused to enforce Municipal Court Civil Rules 11 and 12 (f) against him by allowing his Answer denying all of plaintiffs' amended complaint allegations to stand and denying plaintiffs' three motions to strike and for default judgment (R, 440,439,449,691-705,1111, 1126,1130,1246,1531-2-3, 1536). He denied, among many wrongful

denials, that he was a lawyer and participated in LAT 31299 and CA 3348. Defendant personally authorized his answer (R, 1037-1039). Are these rules applicable to defendant lawyer, the same as to ordinary litigants?

It is hornbook law that court rules have the force and effect of law and parties are entitled to enforcement. In *Phucas v. Wash.-Va.-Md. Coach Co.*, Mun.Ct.App.D.C., 72 A2d 59, the lower court held it "cannot condone either willful or negligent disregard of court rules or orders." Yet defendant was permitted to do so, and protected from a judgment against him to which plaintiffs were entitled. Neither defendant, nor his attorney of record, ever asked leave to amend defendant's Answer, but brazenly stood upon it (R, 440 et seq., 713). They acted as though they confidently expected that the Judges would not hold them to the rules of pleading. If so, they were not disappointed. That Answer caused plaintiffs to prove in detail and by great consumption of time and lengthening of the record many facts of record that defendant should readily have admitted.

This erroneous favoritism to defendant cries out for reversal, and allowance of this appeal.

The Court below so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the trial court, as urgently to call for an exercise of this Court's power of supervision.

V. GENERAL COMMENTS ON THE SITUATION AND OPINION OF THE MUNICIPAL COURT OF APPEALS.

The Law cannot be so blind as to deny plaintiffs a cause of action against defendant in the face of plaintiffs' injuries by defendant's flagrant misconduct, nor so biased as to protect him from the consequences. Plaintiffs contend and submit that the Municipal Court of Appeals' opinion is misleading statement of the case and an erroneous decision. It did not even mention the fact that the Trial Judge on the fifth trial day stated he had not read the complaint (R, 712, 714, 721). The Court assumed that

defendant's client's ratification of his institution¹³ and prosecution of CA 3348 protected him from liability and responsibility for his wrongful actions, ignoring the legal rule that a principal can not lawfully authorize or ratify his agent's torts. *Larson v. Domestic etc. Corp.*, supra; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643, 55 L. ed. 890, 894, 31 S. Ct. 654; *Am. Jur.* 2, Agency, Sec. 4, p. 14; *Am. Jr.* 5, Attorneys at Law, Sec. 8, p. 264, Sec. 147, p. 348 (Citing *Hoppe v. Klapperick*, 224 Minn. 224, 28 NW2d 780, 173 AIR 619).

The Court erroneously ignored and passed over the legal effect of the fact that defendant used his own funds to pay the initial \$12 costs of groundless CA 3348, and tacitly approved his illegal and unethical conduct, although it plainly admits such conduct by stating: "that the money for the filing fee came from the \$500 he (defendant) had received from the group of which Mrs. Kittelle was a member.", which "raised a fund of \$500 as his compensation.", and that "the money for the filing fee came from the \$500 fee he had received."

The Court's statement that "it would constitute a dangerous precedent to permit a lawyer to be charged with maintenance merely because he filed on behalf of a client an action which proved to be without merit and during the course of the litigation permitted his personal feelings to become involved." does not truly state the situation here, and shows undue solicitude for a prominent lawyer and political personality; it utterly disregards the obvious tortious wrongs inflicted by him upon plaintiffs and their rights to protection for proceeding with strict accordance with law in LAT 31299 and from the malicious vengeance of their defeated, opposing lawyer.

CONCLUSION.

This case presents questions of general importance which have not been, but should be, settled by this Court. It urgently calls for allowance of an appeal to permit exercise of this Court's power of supervision over the

judgments of the lower courts which have sacrificed the rights of plaintiffs in favor of undue protection of defendant. If the law is left as the Municipal Court of Appeals has declared it to be, there is no remedy against, and right of recovery from, any defeated lawyer, where a judgment has gone against his client in a case involving small value, who may threaten counter action as defendant did (R, 82) and, or without threat of suit, maliciously files a groundless counter action/erroneously based upon the Marshal's official execution and put the successful judgment owner (and any of its agents and officers) to such expense and waste of time in defense as to make them fear to, or make it impracticable and unwise for them to, use the processes of the law. Unless such a lawyer is held liable and responsible for such injurious, tortious action where based upon his personal knowledge, he may by threat or innuendo cause the surrender/¹⁴ of judgment rights of importance but of small money value. These are inadmissible and wrongful propositions, and should not stand.

Plaintiffs urgently pray for allowance of an appeal.

Respectfully submitted,

H. Clay Espey,
Attorney for Petitioners (Plaintiffs),
219 Southern Building,
1425 H Street, N. W.,
Washington 5, D. C.

iii)

APPENDIX

D. C. CODE, 1951: Sec. 49-301. The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general Acts of Congress not locally inapplicable in the District of Columbia, and all Acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, shall remain in force except in so far as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.

MUNICIPAL COURT CIVIL RULES:

Rule 8 (b) Defenses - Forms of Denials.

A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party

relies. . . . Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11."

Rule 11 Signing of Pleadings.

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, . . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it and that it is not interposed for delay. If a pleading . . . is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleading had not been served. (Italics supplied.)

Rule 12 (f) Motion to Strike.

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 5 days after the service of the pleading upon him or upon the Court's own initiative at any time, the Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Rule 26 (d) Use of Depositions.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, which is a party, may be used by an adverse party for any purpose.

iii

EXHIBIT C

(Caption)

Filed April 4, 1960.

RESPONDENT'S BRIEF IN SUPPORT OF OPPOSITION TO PETITION FOR ALLOWANCE OF APPEAL

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Whether the decision of the Municipal Court of Appeals in Case No. 2468 was decided in a way not heretofore determined by this Court, or in a way probably not in accord with applicable decisions of this Court, or contrary to a decision of the Supreme Court of the United States, or of the United States District Court for the District of Columbia, or contrary to general

law.

2. Whether the Court below has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the Trial Court as to call for the exercise of this Court's power of supervision.
2)

3. Whether said cause presents a question of general importance or a question of substance relating to the construction or application of a statute or municipal ordinance or regulations, which has not been, but should be, settled by this Court.

COUNTERSTATEMENT OF THE CASE

Respondent believes that the Statement of Facts contained in the decision of the Court below is fair and accurate, and does not deem it necessary to correct any inaccuracy or omission in the statement of the case by the petitioners, as provided in Rule 5. However, to the extent that petitioners' statement departs from the record, respondent does not admit such facts, nor does he admit the conclusions or arguments made in petitioners' Statement of Facts.

SUMMARY OF ARGUMENT

In its opinion in Case No. 2468 the Court below fully reviewed each action taken by the Trial Court, and reviewed each action in the light of applicable decisions of this Court, where such decisions in similar cases were reported. On other points, the Court below relied upon the law as expressed by the highest Courts of other jurisdictions in analogous situations. Nowhere does it appear in the decision or the record that the Court below erred so as to call for a review of its decision by this Court in the exercise of its sound judicial discretion.

ARGUMENT.

As respondent reads Rule 4 (b) (6), this Court requires argument to be direct and concise. Respondent must necessarily³ rest its case upon the facts and law, as stated in the opinion of the Municipal Court of Appeals,

and does not think a repetition or paraphrasing of that decision here by way of argument would comply with the spirit of Rule 4. As respondent reads Rule 4 (c), discussion of the merits of the questions to be ruled upon, if the appeal is allowed, is not permissible in this Reply Brief, except to the extent necessary to aid the Court in determining the question whether or not the appeal should be allowed.

CONCLUSION

Wherefore, the premises considered, respondent verily believes that an appeal should not be allowed as the petitioners' Brief fails to raise any question calling for an exercise of discretion under this Court's Rule 1.

Respectfully submitted,

Donald H. Dalton
Attorney for Respondent
815 - 15th Street, N. W.
Washington- 5 - D. C.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Brief in Support of Opposition to Petition for Allowance of Appeal was served upon H. Clay Espey, Esq., Attorney for Petitioners, by mail, postage prepaid, 219 Southern Building, 1425 - H - Street, N. W., Washington 5, D.C., on April 4th, 1960.

Donald H. Dalton,
Attorney for Respondent.

EXHIBIT D

(Caption)

Filed September 12, 1960

MOTION FOR LEAVE TO FILE ATTACHED PETITION FOR RECONSIDERATION OF
DENIAL OF AN APPEAL FROM JUDGMENT OF THE MUNICIPAL COURT OF
APPEALS.

Come now Petitioners Golden Commissary Corporation and William G. Carter, by their undersigned attorney, and move the Court for leave to file their attached Petition for Reconsideration of Denial of an Appeal from Judgment of the Municipal Court of Appeals beyond the expiration of the five (5) day period provided therefor by Rule 10 of this Court's rules governing review

of cases from the Municipal Court of Appeals, and for grounds state:

1. The law announced in the decision of this Court in No. 15,315, Chatterton v. Janousek, decided June 23, 1960, ___ U. S. App. D. C. ___, ___ F2d ___, is contrary to the basis of the Order of this Court denying petitioners' Petition for Allowance of an Appeal, and supports petitioners' application for leave to appeal.

2. This Court's decision in Chatterton v. Janousek was rendered more than five days after said order was passed herein on April 19, 1960.

3. Justice to petitioners' rights requires that this Court review the instant case in the light of its decision in Chatterton v. Janousek.

H. Clay Espey,
Attorney for Petitioners,
219 Southern Building,
1425 H Street, N. W.,
Washington 5, D. C.,
Telephone: NA. 8-2145.

EXHIBIT E.

(Caption)

Attached to and lodged with prior motion.

PETITION FOR RECONSIDERATION OF DENIAL OF AN APPEAL FROM JUDGMENT
OF THE MUNICIPAL COURT OF APPEALS.

The Honorable, The Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit, In Banc:

Golden Commissary Corporation, a corporation, and William G. Carter, plaintiffs in the Municipal Court for the District of Columbia, and appellants in the Municipal Court of Appeals for the District of Columbia, petition this Court, in banc, for reconsideration of and to vacate and set aside the order of a three-judge panel of this Court, dated April 19, 1960, denying petitioners' petition for allowance of an appeal from the judgment of the Municipal Court of Appeals in its No. 2468, entered February 10, 1960, and to allow such appeal, upon the following:

1. Petitioners were and are entitled to appeal to this Court under the law of the decision of this Court in No. 15315, Chatterton v. Janousek,

decided June 23, 1960, ___ U. S. App. D. C. ___, ___ F2d ___. Petitioners submit that the announced law under which Janousek might be held liable for malicious prosecution justifies and requires that the judgment protecting respondent be held erroneous and be reversed.

2. This petition was not filed within five days after the entry of the order denying the appeal, as required by Rule 10 of this Court's rules governing review of cases from the Municipal Court of Appeals, for the reason that this Court's decision in No. 15,315, Chattertonv. Janousek, was rendered June 23, 1960, more than five days after this Court's order denying appeal, passed April 19, 1960. This petition is filed in good faith within the Term of Court.

2) 3. Petitioners sued respondent by instituting this civil action January 24, 1957, in Civil Action No. 3,009-57 in the Municipal Court for the District of Columbia, upon their Complaint for Damages for Unlawful Maintenance, Malicious Use of Process and Malicious Prosecution. It was and is based upon respondent's filing in the United States District Court for the District of Columbia of Civil Action No. 3348-54, Polly Wayne Kittelle, Plaintiff, vs. Golden Commissary Corporation and William G. Carter, Defendants, of his own malicious volition, alleging that the defendants wrongfully caused the United States Marshal to trespass and tear down Mrs. Kittelle's back fence, a completely groundless action, based upon execution by the United States Marshal acting officially under a writ of restitution duly issued upon a final judgment in Municipal Court L&T 31299-54 for Plaintiff Golden Commissary Corporation against Defendant Polly Wayne Kittelle. Mr. Carter was not a party to L&T 31299-54; the nam^{ing} of him was especially malicious. District Judge Curran directed a verdict for petitioners in Civil Action 3348-54 upon respondent's opening statement. Although Mrs. Kittelle was the owner of valuable income producing real estate and not a person in need of charitable assistance by nor related to respondent,

respondent prosecuted Civil Action 3348-54 without calling upon Mrs. Kittelle for costs or fee, and paying the costs and prosecuting the case at his own expense, claiming he was using money from his wholly earned fee in a zoning case in which Mrs. Kittelle participated to the extent of paying respondent \$20.00. The zoning case was concluded before C. A. 3348-54 was instituted. Respondent prosecuted C. A. 3348-54 without probable cause and upon his improper, malicious motive to harass and punish petitioners for defeating him in I&T 31299-54 and executing upon the judgment therein which respondent permitted to become final without motion for rehearing or appeal, and upon the further improper motive to collaterally attack in the United States District Court for the District of Columbia the final judgment of the Municipal Court for the District of Columbia in I&T 31299-54.

4. Respondent's prosecution of C. A. 3348-54 comes squarely within the holding of *Shatterton v. Janousek*, No. 15315, June 23, 1960, ___ U.S. App. D. C. ___, ___ F2d ___, that:

- 3) "Prosecution of a civil suit with an improper motive and without probable cause is actionable as malicious prosecution, when it causes special damage such as seizure of property and ends unsuccessfully."

There is no doubt that respondent prosecuted C. A. 3348-54 with an improper motive and without probable cause to an unsuccessful end. The lower courts and the three-judge panel of this Court have failed to see and give effect to the fact that there was special injury to petitioners by respondent's prosecution of C. A. 3348-54 at his own expense for a financially responsible client. Wrongful attachment of property supports an action for malicious prosecution. *Peckham v. Union Finance*, 60 App. D. C. 104, 48 F2d 106. Wrongful prosecution of two successive baseless civil actions on the same ground supports an action for malicious prosecution. *Soffos v. Eaton*, 80 U. S. App. D. C. 306, 152 F2d 682. Wrongful prosecution of a single baseless civil action and of an appeal from a judgment of dismissal of that same baseless civil action supports an action for malicious prosecution. *Holt v.*

Boyle Bros., 95 U. S. App. D. C. 1, 217 F2d 16. The special damage which supports petitioners' Civil Action 3009-54 against respondent resulted from respondent's prosecution of C. A. 3348-54 at his own expense. Fletcher v. Ellis, 9 F.Cas.No. 4863a; Goodyear Dental Vulcanite Co. v. White, 10 F.Cas. No.5,602; Matthews v. Bawner, 2 App. D. C. 349, p. 360; Johnson v. Van Wyck, 4 App. D. C. 294; Peck v. Heurich, 6 App. D. C. 273, 284; 165 U. S. 624, 630, 17 Sup. Ct. 927, 929, 42 L. ed. 301; Sampliner v. Motion Picture Patents Co., 255 Fed. Rep. 242, 247; Murlaud v. Nat. Met. Bank, 84 F2d 238, 65 App. D. C. 387, 14 C. J. S. 387; 10 Am. Jur. Sec. 36, p. 577.

5. The direction by the Municipal Court Trial Judge of the jury's verdict for respondent was arbitrary and erroneous, and an illegal invasion of the jury's prerogative. The jury trial took six and one-half days; the testimony and evidence of both sides was taken, and the evidence was conflicting. The evidence for petitioners would have supported a verdict for petitioners if the jury had been permitted to perform its function of finding the facts from conflicting evidence and testimony.

6. The decision of the Municipal Court of Appeals for the District of Columbia does not adequately and complete^{ly} delineate the facts and issues of the⁴ case, denied the rights of the petitioners to a jury determination of the facts, is erroneous in law, and calls for an exercise of this Court's power of supervision.

7. Petitioners urge and submit as forcefully as proper language permits that the prior decisions in this litigation are erroneous and unjust, legally, morally, mentally and politically, and should be reviewed by this Court by allowing petitioners to appeal from the decision of the Municipal Court of Appeals for the District of Columbia in its No. 2468, Golden Commissary Corporation and William G. Carter, Appellants, v. Carl L. Shipley, Appellee, 157 A2d 810, Md. Repr. 156-158 A2d 810.

WHEREFORE, petitioners pray this United States Court of Appeals for the District of Columbia Circuit, in banc, to reconsider and to vacate and set

aside the order hereinof the three-judge panel of this Court, dated April 19, 1960, denying petitioners' petition for allowance of an appeal, and to allow petitioners to appeal from the judgment of the Municipal Court of Appeals entered in its No. 2468, denying petitioners' appeal from and affirming the judgment of the Municipal Court for the District of Columbia in its No. 3009-57 for respondent upon an erroneously directed jury verdict for him.

Respectfully submitted,

H. Clay Espey,
Attorney for Petitioners,
219 Southern Bldg.,
1425 H Street, N. W.,
Washington 5, D. C.,

EXHIBIT F

(Caption)

Filed September 15, 1960

OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR RECONSIDERATION.

Comes now respondent and opposes the above referred to motion, on grounds as follows:

1. There must come an end to litigation, and said motion is out of time.
2. The facts involved in Chatterton v. Janousek, No. 15470, decided by this Court June 23, 1960, are so fundamentally different that the case has no applicability to the case at bar, i. e.

- (a) uncontradicted proof of payment of judgment sued on,
- (b) repeated continuances to keep "litigation going indefinitely",
- (c) indirect prevention of Effie Chatterton from receiving funds from title company by keeping litigation over matters not in dispute pending
- (d) basic dispute between attorney and client over fees which were already the subject of a judgment which had been satisfied in substantial part.

3. Petitioner herein has had his day in Court, and has made most serious allegations of impropriety and misconduct against a member of the Bar, but has not adduced evidence to support his allegations. The Chatterton

does not change the law, but simply restates the law as applied to petitioners allegations and evidence at the time of trial and on appeal. It would not be in the interests of fairness and justice to reopen this case.

Donald H. Dalton
Attorney for Respondent
815 15th St., N. W.,
Washington, D. C.

EXHIBIT G

(Caption)

Filed October 12, 1961

MOTION FOR LEAVE TO FILE MOTION TO STRIKE AND EXPUNGE FROM
THE RECORD OUT OF TIME

Comes now respondent in the above matter and moves this Honorable Court for leave to file the attached motion to strike and expunge from the record out of time, and for good cause states: .

1. Respondent could not properly have filed said motion until there was a final decision on the merits, as the motion would have raised collateral issues interfering with a decision on the merits, and would probably have led to a protraction of legal procedures not conducive to the cause of justice.

2. The matter sought to be stricken and expunged is, on its face, so scurrilous that the record cannot be permitted to stand without there having been a bona fide effort by respondent to have it stricken and expunged, since said scurrilous and impertinent matter reflects upon the dignity and impartiality of the Courts involved and should not be left as part of the public record.

Alex Akerman, Jr.
Attorney for Respondent.

EXHIBIT H

(Caption)

Lodged with preceding motion

MOTION TO STRIKE AND EXPUNGE FROM THE RECORD.

Comes now Carl L. Shipley, respondent in the above captioned matter, and moves the Court to strike and expunge from the record certain statements con-

tained in pleadings filed herein by petitioner, on the ground they are redundant, immaterial, impertinent and scandalous, as follows:

1. In petitioner's Motion For Special Leave To File Fourteen Page Brief, on page 1, reference to respondent as "a defeated, prominent attorney at law and political personality," should be stricken and expunged for the reasons stated.

2. In the same motion, page 1, respondent is characterized as trying to "wreak his personal malice and vengeance upon his judgment opponent," and said statement should be stricken and expunged.

2) 3. In the same motion, page 2, petitioner states respondent engaged in "blackmailing" and "punishing and wreaking vengeance" upon other persons, all of which should be stricken and expunged for the reasons stated.

4. In the same motion, page 2, petitioner indicates the Municipal Court would "ignore and fail and refuse to follow this Court of Appeals rule of decision," which should be stricken and expunged for the reasons stated.

5. In the same motion, page 3, petitioner charges "the lower courts have misapplied and misstated the law and glossed over or ignored the facts in order to favor and protect defendant," which should be stricken and expunged for the reasons stated.

6. In the same motion, page 7, petitioner characterizes the opinion of the Municipal Court of Appeals as "a 'white wash' of defendant's clearly proven misconduct," which should be stricken and expunged for the reasons stated.

7. In the same motion, page 11, petitioner stated "defendant prominent attorney at law and political personality was permitted to flout and violate with impunity Municipal Court Civil Rule 8 (b)," which should be stricken and expunged for the reasons stated.

8. In the same motion, page 12, petitioner states "they confidently expected that the judges would not hold them to/³ the rules³ of pleading. If

so, they were not disappointed," which should be stricken and expunged for the reasons stated.

9. In the same motion, page 12, petitioner states "this erroneous favoritism to defendant cries out for reversal," which should be stricken and expunged for the reasons stated.

10. In the same motion, page 13, petitioner states the Court "tacitly approved his illegal and unethical conduct," which should be stricken and expunged for the reasons stated.

11. In the same motion, page 13, petitioner states the Court "shows undue solicitude for a prominent lawyer and political personality," which should be stricken and expunged for the reasons stated.

12. In the same motion, page 13, petitioner accuses the lower Court of having "sacrificed the rights of plaintiffs in favor of undue protection of defendant," which should be stricken and expunged for the reasons stated.

While it would have been more timely to move earlier to strike the above cited contemptuous and libelous statements, it would have introduced a collateral issue prior to a decision on the merits. Now that the case has been disposed of on the merits, respondent, a practicing attorney and officer⁴ of this Court, respectfully submits that the cited statements are a calculated contempt on the lower Courts and a libel, under the presumed protection of the pleading privilege, against Carl L. Shipley, leaving with any reader of the record an impression that even though respondent prevailed on the merits, the decision was the product of political favoritism, and not an orderly judicial proceeding. Said statements bring the judicial system into disrepute, shake public confidence in the impartiality and fairness of the judicial process, and in general constitute so scurrilous an attack on the members of the bench and bar, that this Court should exercise its inherent power to strike and expunge the above cited calumnies from the record.

Respectfully submitted, Alex Akerman, Jr.
Attorney for Respondent.

EXHIBIT I

(Caption)

Lodged October 9, 1961

PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENT'S
MOTION TO STRIKE AND EXPUNGE FROM THE RECORD.

Come now Golden Commissary Corporation, a corporation, and William G. Carter, petitioners herein, and oppose respondent's Motion to Strike and Expunge From The Record as unworthy of favorable action because of the illegal and unethical conduct of respondent from which this litigation arose and in his defense of it, as clearly shown in the records below, respectfully contending for and submitting as sufficient and valid for denial of his motion the following grounds:

a. Respondent has made no factual showing -- has stated only his conclusions -- that the arguments and statements quoted by him are "redundant, immaterial, impertinent and scandalous." Each quotation is stated out of context without regard to its factual setting. Petitioners submit that to act favorably on respondent's unsupported motion would be arbitrary and an abuse of discretion, and that thereby this Court would enter upon illegal and unconstitutional censorship.

b. Petitioners maintain and submit that every quoted argument and statement is fully justified and supported by the Record below, consisting of 1683 pages in Municipal Court of Appeals No. 2468 and 81 pages in its No. 2019, and that, in order to grant this application, this Court arbitrarily would have to deny fact and truth. Respondent's numbered paragraphs are answered below in detail.

2) c. Respondent's motion comes too late; it should have been made on September 15, 1960, at the same time his Opposition To Petitioners' Motion For Leave To File Petition For Reconsideration was filed. More appropriately it should have been filed about April 6, 1960, when respondent's brief in opposition to petitioners' brief containing the question quotations was filed. Petitioners suggest that it is not coincidental that respondent's

motion is filed at this time, at the same time that a motion for extension of the time within which to file opposition to a petition for leave to appeal in forma pauperis in Miscellaneous No. 1723 has been made, which specifically mentions this case, after attacking personally petitioners' attorney.

d. Petitioners submit that the records below, and especially respondent's admissions at the trial, show that he, a member of the Bar of this District, was guilty of illegal and unethical conduct, in that he filed and prosecuted an utterly groundless civil action for Mrs. Polly "ayne Kittelle against petitioners out of personal malice, thereby being guilty of malicious use of process and malicious prosecution, and in that he paid the costs and rendered his services without charge to and for Mrs. Kittelle who was far from being a pauper and who was not his relative, thereby being guilty of the common law offense and tort of unlawful maintenance, and putting petitioners to the special damage of the heavy expense and great time required for defense. The cases cited in the briefs support the foregoing. Respondent's conduct was unprofessional and unethical, and in violation of the Canons of Professional Ethics which have the force and effect of law. See *Re George I Rothman*, 1953, 12 NJ 528, 97 A2d 621, 39 A1R2d 1032, where Ch. J. Vanderbilt held:

"The Canons of Professional Ethics undertake to codify in convenient form the traditions and practices that have been recognized over the centuries as part of the common law with respect to the lawyer's obligations to the courts and the administration of justice, to the public and his clients, and to his profession and his fellow practitioners. They are as obligatory on him as if cast in statutory form, as indeed they are in large part in many states."

3) See also *Consolidated Theatres v. Warner Bros. Cir. Mgmt. Corp.*, 216 F2d 920, 52 A1R2d 1231, holding

" . . . But we think that fundamentally the Canons must be viewed not as a Bill of Rights for the Bar, but, rather, a codification of the more important limitations on legal practice broadly deemed necessary for the protection of clients."

In denying petitioners redress for the wrongs done them by respondent, there has been failure and neglect to recognize that petitioners' attorney has

acting in strict accordance with the Canons. William G. Carter has been his client since about 1930, excepting the thirty-three months that the undersigned attorney for petitioners was serving in World War II in the Army of the United States. Golden Commissary Corporation has been his client since he returned in 1945 from Army service. Canon 15 states that "No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." Canon 29 states that "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession and should accept without hesitation employment against a member of the Bar who has wronged his client."

e. The denial in this case of redress to Petitioners Golden Commissary Corporation and William G. Carter was a complete and grievous miscarriage of justice; respondent's wrongful conduct continues to call for redress to them.

Answering respondent's numbered paragraphs, petitioners contend and submit:

1. It is fact and truth that respondent in this litigation was and is "a defeated, prominent attorney at law and political personality." Respondent denied by his answer that he was "a member of the Bar of the United States District Court for the District of Columbia, and of the Municipal Court" (R., 1531), as alleged by petitioners (R., Mun.Ct.App. 2019, p. 42). He was such member (R., 729, 1640). Respondent was attorney for Mrs. Kittelle, defendant in L&T 31299-54, where Golden Commissary was plaintiff (R., 469, 1584). He was defeated (R., 1564, 1585). The Court should take judicial notice that respondent is prominent and a political personality, for such is common knowledge, locally and nationally. See R., 729, 730.

4) 2. It is fact and truth that respondent here did "wreck his personal malice and vengeance upon his judgment opponent." by filing on August 6, 1954, two days after the U. S. Marshal's deputies had executed on August 4, 1954, a valid and subsisting writ of restitution issued upon a valid, subsisting and final judgment in L&T 31299-54, and prosecuting his utterly

groundless Civil Action 3048-54 naming Mrs. Kittelle as plaintiff (without prior consultation with her for she was in Europe) and Golden Commissary and William G. Carter as defendants (R., 1568) for damages for their lawful conduct in L&T 31299-54. He was mad (R., 482,484). Also he made William G. Carter a defendant therein, the first time Mr. Carter had ever been sued at law (R., 452). Mr. Carter, as treasurer and general manager of Golden Commissary, had signed its complaint in L&T 31299-54 against Mrs. Kittelle (R., 1578), but he was not a party to L&T 31299-54 (R., 1577).

3. Petitioners contend and submit that respondent did engage in "blackmailing" them, and did engage in "punishing and wreaking vengeance" upon them. The "punishment and wreaking vengeance" has been explained and supported in numbered paragraph 2. The "blackmailing" occurred on August 4, 1954, during the U. S. Marshal's completely lawful execution of the writ of restitution in L&T 31299-54 by removing from Golden's land the back and easterly fence of Mrs. Kittelle's property designated 1065 Thomas Jefferson Street, Northwest. Deputy U. S. Marshal William H. Kimball testified that Respondent Shipley came to the site representing Mrs. Kittelle during the taking down of the fence (R., 79) and said that suit would be filed for the costs of the removal of the fence (R., 82). Deputy U. S. Marshals Kimball and Bernard Greene made affidavit ^{that} in the course of their execution of the writ of restitution in L&T 31299-54 (R., 1599-1600), it occurred

"That in the course of the above actions said Carl L. Shipley, Esq., stated to said H. Clay Espey, Esq., several times that he as attorney for Polly Wayne Kittelle intended to institute an action for damages against Golden Commissary Corporation and William G. Carter, its managing officer, for tearing down and removing said fence."

It was and is the understanding of petitioners, through their attorney, that Respondent Shipley was attempting by his threats of suit to compel them and ⁵ their attorney to give up and surrender the benefit of their judgment for possession in L&T 31299-54 and to instruct the Deputy U. S. Marshals to refrain from executing the writ, and to compel them to restore the fence. It

is the understanding of petitioners and their attorney that such threats are blackmail under Section 22-2305, D. C. Code, 1951, providing that:

"Whoever verbally . . . threatens to accuse any person . . . of any conduct which, if true, would tend to disgrace such other person, or in any way subject him to the ridicule or contempt of society, or threatens to expose or publish any of his . . . failings, with intent . . . to compel the person . . . threatened to do or refrain from any act . . . shall be imprisoned for not more than five years or be fined not more than one thousand dollars, or both."

4. Respondent here misstated, out of context, the facts and situation. Petitioners merely stated a question of law involved in their application for allowance of an appeal, as mandatorily required by Rule 4 (b) (2) of the Rules of this Court Governing Review of Cases from the Municipal Court of Appeals for the District of Columbia, as follows:

"4. Can the Municipal Court of Appeals (and also the Municipal Court) ignore and fail and refuse to follow this Court of Appeals' rule of decision that a motion to dismiss should be overruled if any cause of action is stated in or can be proved in support of a complaint, as was done here by (1) overruling defendant's motion to dismiss plaintiff's amended complaint as to their allegations of unlawful maintenance, and (2) erroneously going further and granting it as to plaintiffs' allegations of malicious prosecution and malicious use of process.
 "(a) The question was answered "Yes" by the Municipal Court of Appeals.
 "(b) Plaintiffs contend it should be answered "No."

The question was and is stated in professional and proper terms, and should not be changed to suit the wish of respondent.

5. Respondent here misstated, out of context, the facts and situation. Petitioners stated, as they had full right to do, that

"Plaintiffs contend, as it appears to them, that the lower courts have misapplied and misstated the law and glossed over or ignored the facts in order to favor and protect defendant."

Petitioners made no unequivocal charges, as stated by respondent, but stated in plain proper words their contention. This they had full right to do in order that this Court might understand their proposition on appeal.

6) 6. Respondent here misstates, out of context, the facts and situation. Petitioners stated, as they had full right to do, that

"The opinion of the Municipal Court of Appeals, we regretfully state, appears to us to be a 'whitewash' of defendant's clearly proven

misconduct, an evasion of the legal issues involved, a denial of the rights of the plaintiffs, and to indicate urgent call for an exercise of this Court's power of supervision."

The foregoing quotation was merely the concluding paragraph of petitioners' Statement of the Case to this Court. Petitioners submit that it is not only a proper statement of the case, but is supported by record facts pointed out in the balance of the brief of which it is a part.

7. Petitioners contend and submit as a matter of fact and truth that "defendant prominent attorney at law and political personality was permitted to flout and violate with impunity Municipal Court Civile Rule 8 (b)." This then provided, and now provides:

"A party shall state in short and plain terms his defense to each claim asserted and shall admit or deny the averments upon which the adverse party relies . . . Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. . . ."

The amended complaint filed April 3, 1957 (R., Mun.Ct.App. 2019, p. 42), set forth many facts. Many of them were of record, including the facts: that respondent was a member of the Bar; that he maliciously and groundlessly filed and instituted Civil Action 3048-54, and maliciously used process therein; that respondent paid the costs thereof; that petitioner Golden had instituted I&T 31299-54 against Mrs. Kittelle; that respondent prepared and filed her answer; that Golden's Motion to Strike Answer Alleging Title and for Judgment on Verified Complaint was served on respondent here; that Municipal Court Judge Scott, after appearance and argument by respondent here as attorney for Mrs. Kittelle, had granted Golden's motion to strike and for judgment in its favor; that respondent here never took any appeal or attacked said judgment, etc. Yet, in the face of said Rule 8 (b) and the facts alleged in the amended complaint in this litigation, of which respondent had personal knowledge, respondent flouted and violated with impunity said Rule 8 (b) by authorizing his attorney in this litigation below (R., 1039) to file on

August 17, 1957, his three/⁷ line answer (R., 1531) as follows:

"Comes now defendant Carl L. Shipley and denies all allegations contained in the complaint herein, and requests that it be dismissed with costs of defendant."

Petitioners promptly filed their Motion to Strike Answer and For Default Judgment. (R., 1532). On October 3, 1957, then Municipal Court Chief Judge Walsh presided at the taking of Respondent Shipley's deposition (R., 1246 et seq.) and heard him admit under oath many of the allegations of the amended complaint that respondent denied by his answer. Yet Chief Judge Walsh on April 2, 1958, overruled petitioners' Motion to Strike Answer and for Default Judgment (R., 1536). The allegations of petitioners' amended complaint were proved on trial, albeit great difficulty because of respondent's answer and trial tactics (R., 1-1233), including the fact that he was a member of the Bar (R., 1640), and to which he finally testified (R., 729). Petitioners submit that it is plain and beyond argument that respondent "was permitted to flout and violate with impunity Municipal Court Civil Rule 8 (b)," and that their statement was and is correct in fact and truth. Therefore, it is not subject to striking and expunging.

8. Respondent here misstates, out of context, the facts and situation. Petitioners stated in their Brief In Support of Petition For Allowance Of An Appeal, p. 12, as follows:

"It is hornbook law that court rules have the force and effect of law and parties are entitled to enforcement. In *Phucas v. Wash.-Va.-Md. Coach Co.*, Mm.Ct.App.D.C., 72 A2d 69, the lower court held it "cannot condone either wilful or negligent disregard of court rules or orders." Yet defendant was permitted to do so, and protected from a judgment against him to which plaintiffs were entitled. Neither defendant, nor his attorney of record, ever asked leave to amend defendant's Answer, but brazenly stood upon it (R., 440 et seq., 713 et seq.). They acted as though they confidently expected that the Judges would not hold them to the rules of pleading. If so, they were not disappointed. That Answer caused plaintiffs to prove in detail and by great consumption of time and lengthening of the record many facts of record that defendant should readily have admitted."

Petitioners contend and submit that their statement is a proper argument, properly supported by the record, and that it would be arbitrary and an

abuse of discretion to censor and strike and expunge their argument.

9. Petitioners contend and submit that the record fully supports their argument, that/⁸

"This erroneous favoritism to defendant cries out for reversal, and allowance of this appeal."

Petitioners ask in all respect whether it was not erroneous favoritism to defendant attorney at law, and respondent here, to allow him to flout, and to fail, neglect and refused to hold him to the requirements of, Municipal Court Civil Rule 8 (b) requiring him to admit petitioners' allegations that respondent was a member of the Bar of the United States District Court for the District of Columbia and of the Bar of the Municipal Court for the District of Columbia, and the other record facts that were beyond dispute. During the trial respondent personally spoke up and admitted that he paid the court costs (R., 439), his answer denied. Petitioners orally renewed their motion to strike and for default judgment (R., 440, 1531). The Trial Court erroneously overruled the renewed motion (R., 449). On the fifth day of trial, after plaintiff petitioners had proved all of their Amended Complaint allegations, they orally renewed their motion to strike defendant's answer denying "all allegations." On the sixth trial day, the Trial Judge erroneously overruled petitioners' renewed motion (R., 1126), and said erroneously that "motions like that come too late in this case." (R., 1126, 1130). Petitioners submit that in the circumstances and facts they were entitled to make the quoted argument, and the application to strike and expunge should be denied.

10. Petitioners contend and submit that the record fully supports their argument that the Municipal Court of Appeals "tacitly approved his illegal and unethical conduct." Petitioners' complete statement in argument in their Brief in Support of Petition For Allowance of An Appeal was as follows:

"The Court /Municipal Court of Appeals/ erroneously ignored and passed over the legal effect of the fact that defendant used his own funds to pay the initial \$12 costs of groundless CA 3348, and tacitly approved his illegal and unethical conduct, although it plainly admits

such conduct by stating: "that the money for the filing fee came from the \$500 he respondent had received from the group of which Mrs. Kittelle was a member.", which 'raised a fund of \$500 as his compensation.', and that 'the money for the filing fee came from the \$500 he had received."

The Municipal Court of Appeals plainly said, according to petitioners' understanding of language, that the \$500 fee he received in the zoning case was respondent's ⁹ property, and that he had used part of his property to pay Mrs. Kittelle's costs in C. A. 3348-54. It is plain in the decisions and in the Canons of Professional Ethics that it is unlawful maintenance for a lawyer to use his personal funds to pay his client's court costs and to render his professional services without charge in litigation for a person who is able to pay therefor, i. e., one who is not a pauper, or who is not a relative, especially where this is done in furtherance of his personal malice. Canon 28 states in part: "Stirring up strife and litigation is not only unprofessional, but it is indictable at common law." Canon 42 states: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement." Respondent never billed Mrs. Kittelle for or was paid by her for the costs he paid to institute C. A. 3348-54 and for his services in preparing, instituting and prosecuting it. (R., 124, 124,1056). Mrs. Kittelle was an artist and the owner of 1065 Thomas Jefferson Street. (R., 88, 89). The word "tacitly" is the adverb of "tacit." A definition of "tacit" is "Done or made in silence; implied or indicated, but not actually expressed; as, tacit consent." Webster's New International Dictionary, Second Ed., Unabridged. Petitioners submit that the Municipal Court of Appeals by its decision and words "implied or indicated" approval of respondent's plainly illegal and unethical conduct, and that the record and even the statements of fact in the opinion of the Municipal Court of Appeals support petitioners' argument that said Court "tacitly approved his illegal and unethical conduct." Therefore, this phrase is not properly subject to striking and expunging.

11. Petitioners contend and submit that the record fully supports their argument that a statement of the Municipal Court of Appeals "shows undue solicitude for a prominent lawyer and political personality." Petitioners' complete statement in their argument in their brief was as follows:

"The Court's statement that 'it would constitute a dangerous precedent to permit a lawyer to be charged with maintenance merely because he filed on behalf of a client an action which proved to be without merit and during the¹⁰ course of the litigation permitted his personal feelings to become involved.'" does not truly state the situation here, and shows undue solicitude for a prominent lawyer and political personality; it utterly disregards the obvious tortious wrongs inflicted by him upon plaintiffs, and their rights to protection for proceeding with strict accordance with law in L&P 31299 and from the malicious vengeance of their defeated, opposing lawyer."

The quoted statement of the Municipal Court of Appeals is elliptical for it fails to show that respondent was charged with maintenance because he used his own personal funds to pay the court costs of Civil Action 3348-54 and bore his expenses of living and operating his office while he prosecuted that groundless, malicious action. As a matter of simple fact, as a reading of petitioners' amended complaint will plainly show (R., No. 2019, p. 42), respondent was charged with unlawful maintenance of Civil Action 3348-54 for personally paying its costs and prosecuting it at his own expense without reimbursement or claim by him for reimbursement by Mrs. Kittelle, a person who was able to pay and not a relative of his. Respondent, contrary to the statement of the Municipal Court of Appeals, was in fact not "charged with maintenance merely because he filed on behalf of a client an action which proved to be without merit and during the course of the litigation permitted his personal feelings to become involved." Petitioners submit that the quoted statement of the Municipal Court of Appeals "does not truly state the situation here, and shows undue solicitude for a prominent lawyer and political personality." Therefore, the quoted statement in argument is not properly subject to striking and expunging.

12. Petitioners contend and submit that the record fully supports their arguments in the conclusion of their brief that the lower courts have

"sacrificed the rights of plaintiffs in favor of undue protection of defendant." Petitioners' complete "Conclusion" was as follows:

"This case presents question of general importance which have not been, but should be, settled by this Court. It urgently calls for allowance of an appeal to permit exercise of this Court's power of supervision over the judgments of the lower courts which have sacrificed the rights of plaintiffs in favor of undue protection of defendant. If the law is left as the Municipal Court of Appeals has declared it to be, there is no remedy against, and right of recovery from, any defeated lawyer, where a judgment has gone against his client in a case involving small value, who may threaten counter action as defendant did (R, 82) and, or without threat of suit, maliciously file a ¹¹ groundless counter action erroneously based upon the Marshal's official execution and put the successful judgment owner (and any of its agents and officers) to such expense and waste of time in defense as to make them fear to, or make it impracticable and unwise for them to, use the processes of the law. Unless such a lawyer is held liable and responsible for such injurious, tortious action where based upon his personal knowledge, he may by threat or innuendo cause the surrender of judgment rights of importance but of small money value. These are inadmissible and wrongful propositions, and should not stand."

Petitioners, in the circumstances, and facts, had full right to make and support in making the foregoing argument. It should not be censored by striking or expunging as moved by respondent.

Further answering respondent's motion, petitioners submit:

This Court in *Jancusek v. Chatterton*, June 23, 1960, 108 U. S. App. D. C. 171, 280 F2d 719, laid down the law against respondent's conduct that should have been pronounced in this case. See Petition for Reconsideration of Denial of An Appeal, filed with motion for leave to file, on September 12, 1960.

Petitioners respectfully question the correctness of respondent's statement "that the case has been disposed of on the merits" and submit that there has been no disposition of it where the circumstances and facts have been fully stated and a correct, logical decision made in accordance with legal principles, supported by citation of applicable authorities.

Petitioners deny "that the cited statements are a calculated contempt on the lower courts and a libel, under the presumed protection of the pleading privilege, against Carl L. Shipley."

Petitioners respectfully state that it was not their statements (which

were and are firmly based upon the record), but the acts and conduct of respondent and his release from responsibility that "bring the judicial system into disrepute, shake public confidence in the impartiality and fairness of the judicial process." The great majority of members of the Bar do not engage, and would avoid engaging, in malicious prosecution, malicious use of process and unlawful maintenance, such as this case. Consequently, petitioners' quoted statements in respondent's motion in their seeking for lawful redress for their wrongs at respondent's hands, directed solely at respondent's conduct, do not "in general constitute so scurrilous an¹² attack on members of the bench and bar, that this Court should exercise its inherent power to strike and expunge" from the record petitioners' arguments and statements, taken out of context. Petitioners submit that all of their statements, quoted by respondent's motion, when considered in context are fully justified and supported by the record.

Respondent's motion should be denied and overruled, as too late and unwarranted.

Respectfully submitted,

GOLDEN COMMISSARY CORPORATION,

By William G. Carter,
Treasurer and General Manager,

William G. Carter, Individually.

H. Clay Espey,
Attorney for Petitioners.

EXHIBIT K

(Caption)

Lodged October 13, 1961

SUPPLEMENT TO PETITIONERS' MEMORANDUM IN OPPOSITION TO RESPONDENT'S
MOTION TO STRIKE AND EXPUNGE FROM THE RECORD.

Supplementing petitioners' opposition to respondent's Motion To Strike And Expunge From The Record on the ground that the portions of petitioners' brief quoted by respondent are justified and supported by the record, and

for further grounds for denial of said motion and for redress to petitioners, they respectfully submit as follows:

This Court has decided, in cases of especially aggravated malicious use of process and malicious prosecution, that an action lies without the artificial support of special damages.

Soffos v. Eaton, 80 U. S. App. D. C. 306, 152 F2d 682.
Holt v. Boyle Brothers, Inc., 95 U. S. App. D. C. 1, 217 F2d 16.

There was no mention of actual seizure of property in these cases, such as this Court seems to make an indispensable element in Chatterton v. Jancusek, 108 U. S. App. D. C. 171 (1960), 280 F2d 719, by stating that

"Prosecution of a civil suit with an improper motive and without probable cause is actionable as malicious prosecution when it causes special injury such as seizure of property and ends unsuccessfully." / 2

Petitioners submit that it is common knowledge that especially aggravated malicious use of process in and malicious prosecution of a law case is, in itself, special injury to feelings and reputation, without even considering the burden and expenses, direct and indirect, of defending it. Petitioners respectfully submit that where a defendant in such a case is denied redress the law and the courts fall into disrepute.

Petitioners submit that Respondent Shipley's actions were especially aggravated malicious prosecution and malicious use of process, because he knew from being personally present and examining the writ of restitution that the United States Marshal's deputies acted officially in execution of the writ in taking down the fence, and because he filed on August 6, 1954, two days later, utterly groundless Civil Action 3348-54 in the District Court claiming the fantastic sum of \$3,001.00 for an old board back fence, and because he unlawfully maintained it by paying the costs from his personal funds and prepared, filed and prosecuted it without fee and without claim for the costs and for his services from Plaintiff Mrs. Attelle, who was not his relative nor a pauper. All this shows respondent had no probable cause whatever. Petitioners further submit that they have heretofore shown that

respondent made false charges against them in Civil Action 3348-54 complaint which were further aggravation. Civil Action 3348-54 resulted in judgment for petitioners here upon directed verdict on respondent's opening statement.

Conceding, as stated in *Soffos v. Eaton*, supra, that

" . . . Some sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights.",

petitioners submit that respondent lawyer could and should be held responsible for the reason that his testimony on the trial shows that he could not and did not show an "honest assertion of supposed rights."

"The right to litigate is not the right to become a nuisance."

Melvin v. Pence, 76 U. S. App. D. C. 154, 157, 130 F2d 423,
143 A. L. R. 149.

Respectfully submitted,

H. Clay Espey,
Attorney for Petitioners.